FILE COPY

FEB 23 19

Supreme Court of the United States

OCTOBER TERM, 1931.

No. 585.

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY, *Appellant*,

vs.

JAMES M. BORUM, *Appellee.*

APPELLEE'S BRIEF.

TOM DAVIS,
ERNEST A. MICHEL,
Attorneys for Respondent,
419 Metropolitan Bank Bldg.,
Minneapolis, Minnesota.

Hayward Brief Co., 601-7 Fourth Ave. So., Minneapolis

INDEX.

	Page
Statement of the case	1
Supplemental facts	2
Brief resume of facts	2
Liability undisputed	3
Interstate commerce admitted	4
The Thirty Day Rule	4
The Employment Rule	4
Borum's employment accepted	4
Customary for employees to misstate age or give "railroad age"	4
Borum did not intend to deceive. He followed the practice as to "railroad age"	5
The carrier paid little attention to age limits	7
Knowledge of company as to misstatement of age—the practice	8
The Thirty Day Rule	10
The findings of the arbitrators	13
Supplemental finding No. 2	13
No fraud	14
Findings final	15
Decision of lower courts unanimous in appellee's favor	15
Argument	15
The questions for determination by this court	15
Decisions upholding Minnesota Supreme Court practically unanimous	18
Question 5	19
Would the enforcement of the rule of the defendant violate Sections 1 and 5 of the Employers' Liability Act?	19
"Employed" and "Employee" used in natural sense	21
Rule 16 cannot defeat liability	21
Rule could not prevent recovery—rule was waived, even if defense not barred by statute	22
Question 4	24
The Thirty Day Rule	24
The Thirty Day Rule a limitation	25
Physical condition important—age unimportant	25
Consideration of the Rock case	26
What remedy for employees?	30
Men over fifty might be employed	31
If one rule enforced, why not another?	21
Borum was an employee	32
Borum would be entitled to wages	32
Conclusion	33

TABLE OF CASES.

Page

Baker vs. Beattie, 222 S. W. 658 (Tex.) 18
Blick vs. Toye Bros., etc., 13 La. App. 525, 127 So. 59 19
Burbo vs. Minneapolis & St. L. R. Co., 121 Minn. 326, 141 N. W. 300 22
Baltimore & Philadelphia Steam Boat Co. vs. Norton, 52 Sup. Ct. 187 32
C. M. & St. P. Ry. Co. vs. Coogan, 271 U. S. 472 33
Denver & R. G. R. Co. vs. Reiter, 47 Colo. 417, 107 Pac. 1100 ... 18
Fort Worth & D. C. Ry. Co. vs. Griffith, 275 W. (2d) 351 19
Galveston R. Co. vs. Harris (Tex.), 107 S. W. 108 18
Gango vs. Ford Motor Co., 250 Mich. 247, 230 N. W. 159 19
Gooch vs. Oregon Short Line Co., 258 U. S. 20, 66 L. Ed. 443 25
Hart vs. New York Central, etc., 205 N. Y. 317, 98 N. E. 493 18
Hazoo & M. V. R. Co. vs. Cobb, 48 So. 522 (Miss.) 18
Hull vs. Philadelphia & Reading Ry. Co., 252 U. S. 475, 64 L. Ed. 670 ..... 21, 28
Kansas City M. & O. R. Co. of Texas vs. Estes, 203 S. W. 1155 (Tex.) 18
Lupher vs. Atchison, etc., R. Co., 81 Kan. 585, 106 P. 284, 25 L. R. A. (N. S.) 707 18
Louisville, etc., vs. Lewis, 218 Ky. 197, 291 S. W. 401 18
Lake Shore & M. S. R. Co. vs. Baldwin (Ohio Circuit Decisions, Vol. 10, 333) 18
Mpls. St. P. & S. St. M. Ry. vs. Rock, 279 U. S. 410 14
M. St. P. & S. St. M. Ry. vs. Moquin, 283 U. S. 52, 51 Sup. Ct. 501 ..... 15, 34
Matlock vs. Railroad, 198 Mo. 495, 95 S. W. 849, 115 Am. St. Rep. 481 18
Norfolk, etc., vs. Bondurant, Adm'r, 107 Va. 515, 59 S. E. 1091 .. 19
Otos vs. Great Northern R. Co., 128 Minn 283, 150 N. W. 1022 (affirmed 239 U. S. 349) 22
Payne vs. Daugherty (C. C. A.), 283 Fed. 353 ..... 18, 21, 22, 24
Phila. B. & W. R. Co. vs. Schubert, 224 U. S. 602, 56 L. Ed. 911 .. 22
Qualls vs. Atchison, etc. (Cal. App.), 296 P. 645 18
Reegan vs. Union Mutual Life Ins., 189 Mass. 555 25
Robinson vs. B. & O. Ry. Co., 237 U. S. 84, 59 L. Ed. 849 28
St. Louis, etc., vs. Brantley, 168 Ala. 579, 53 So. 305 18
Stafford vs. B. & O. R. Co., 262 Fed. 807 19
Ward vs. Elgin, etc., R. Co., 259 Ill. App. 672 18
Ward vs. E. J. & E. Ry. Co., 259 Ill. App. 672 19

TEXT.

13 Harvard Law Review 141 ..... 19, 27
28 Michigan Law Review 357 ..... 19, 27
14 Minnesota Law Review 646 ..... 19, 27
Minnesota Law Review, Volume 16, No. 2, Pages 216-217 34

Supreme Court of the United States

OCTOBER TERM, 1931.

No. 585.

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY, *Appellant,*

vs.

JAMES M. BORUM, *Appellee.*

APPELLEE'S BRIEF.

Heretofore Appellee, as Respondent, presented a brief in opposition to the granting of a Writ of Certiorari herein. In that brief such facts were stated as were deemed sufficient to present the question then for determination by this Court.

In the consideration of the case on the merits we feel that a more complete statement of facts might be helpful and that some further views should be expressed as to the merits of the controversy. With this in view we now direct the Court's attention to the following:

STATEMENT OF THE CASE.

Appellee Borum, the plaintiff below, while employed as a switchman for Appellant, lost both his legs because of the undisputed negligence of his Employer.

A dispute arising as to whether the doctrine of the *Rock*

Case, 279 U. S. 410, would bar a recovery, the matter was submitted to Arbitrators for determination under the Minnesota practice. Borum, in securing employment, misstated his age eleven years.

The Arbitrators held, in effect, that the Rock case did not apply and that Borum was an employee within the meaning of the Federal Employers' Liability Act (581).

The District Court, under the Minnesota practice, affirmed the award of the Arbitrators and judgment was entered thereon.

Upon appeal the Supreme Court of Minnesota affirmed the judgment. The case, therefore, comes before this Court with the unanimous decisions of the lower tribunals in Appellees' favor.

SUPPLEMENTAL FACTS.

The facts as here given are in addition to and supplement the facts as stated in our Brief in Opposition to the Granting of the Writ of Certiorari.

BRIEF RESUME OF FACTS.

Briefly stated, the facts as to plaintiff's employment were as follows:

Borum was 49 years of age (574).

His "railroad age" was 38 (574).

Borum applied to the yardmaster, Danforth, for a job in 1921 (102-103).

Borum told Danforth his "railroad age" was 38, but that he was 11 years older than his railroad age (111).

Danforth said he would see the Superintendent and see what he could do (111).

In a few days, Borum returned. Danforth gave him "a slip" of paper, which he took to the Employing Clerk (112-114).

The Clerk was suspicious about Borum's age, told him he looked too old and sent him back to the Superintendent (118-121).

Borum told the Superintendent his "railroad age" was 38 (120).

The Superintendent said he needed men and sent Borum back to the Employing Clerk (120).

The Employing Clerk then told Borum to fill out the application like he had when he was previously employed by the carrier in 1911. In this first application Borum gave his railroad age, which was 11 years under his real age. He also gave his "railroad age" in the second application.

After this, Borum (121) took the physical examination, was found to be physically fit and to have the physical attributes of a man 38 years of age (123) (358).

Borum then went to work and *worked regularly for seven years as a switchman* and until the date of his injury.

Neither his physical condition, his age nor anything in connection with the application for employment had anything to do with his injury (Finding No. 11 of Arbitrators, 576).

LIABILITY UNDISPUTED.

Subject to the claim of the carrier that Borum was not an employee because he had misstated his age liability was undisputed. Upon the hearing, plaintiff simply made a *prima facie* case of liability which defendant did not contest.

INTERSTATE COMMERCE ADMITTED.

It was conceded that Borum was engaged in interstate commerce, if he was an employee within the meaning of the Act.

THE THIRTY DAY RULE.

A rule of the Company provided:

> "Applications for employment in yard service not rejected in thirty days will be considered accepted" (576-577).

THE EMPLOYMENT RULE.

The Company had a rule as follows:

> "No person inexperienced in railroad work over thirty-five years, and no experienced person over forty-five years, shall hereafter be taken into the service" (578).

These rules applied to an employee such as Borum.

BORUM'S EMPLOYMENT ACCEPTED.

Borum's application for employment was *not* rejected within thirty days but he worked seven years after being employed.

CUSTOMARY FOR EMPLOYEES TO MISSTATE AGE OR GIVE "RAILROAD AGE."

The practice and custom of employees to misstate their age or to give what they called "railroad age" was common in Minnesota and the Northwest territory. This practice was known to the Employing Officers of the carrier (489-490-493).

The evidence relative to the knowledge of the carrier as to this practice will be referred to in more detail hereafter.

The Arbitrators found the practice to be general "and that the defendant was aware of such practice" (Supplemental Finding No. 2) (597).

BORUM DID NOT INTEND TO DECEIVE. HE FOLLOWED THE PRACTICE AS TO "RAILROAD AGE."

Borum testified on cross examination that he did not intend the railroad company to believe from his application that the age he gave was his true age but that it was his railroad age (174, 177).

> "Q. What did you intend that they should believe?
>
> A. To believe it is my railroad actual age—my age in the railroad" (178).

When asked if he wrote in the date as the date of his birth, Borum said:

> "A. My railroad birth" (187).

He further testified:

> "A. No; that is my railroad age, right there (indicating)—1883. That is not my actual age.
>
> Q. It is eleven years younger than your actual age, isn't it?
>
> A. Yes, sir.
>
> Q. You knew that Dr. Rishmiller would not pass you if you stated your true age, didn't you?
>
> A. No, I did not know that; I did not know what he would do" (188).

Borum further said that he did not know he would not be accepted as an employee if he were in his fiftieth year (216).

He testified that he got his knowledge of the rule in question from other switchmen and not from headquarters (213).

"Q. You knew that if you told them that you were in your fiftieth year, that you would not be taken into the service, didn't you?

A. No, I did not know that, no.

Q. You suspected that?

A. They were liable to hire me over the age limit, which they have done" (216).

He stated that he only wanted to convey by his application his railroad age (228).

"A. That has been my railroad age ever since I went railroading" (230).

Other than the general giving of his railroad age, it was not Borum's intent to deceive.

"Q. You did not want to tell the company any different, did you?

A. *If they had asked me, I would*" (230).

On cross examination of Borum by counsel for the railroad company, the following appeared:

"Q. You understood, when you made this second application in 1921, that if your application was not rejected within thirty days, that it would be considered accepted, and that your rights would attach as a switchman, didn't you?

A. Yes, according to the schedules.

Q. You knew that you could not be discharged after that thirty days except on written charges made against you, and a full hearing, at which you could have present some other employee of your choice to represent you, that is right, isn't it?

A. That is right" (238-239).

In connection with the above, *if Borum could not be discharged,* would it not be an anomaly to say that he was *not* subject to discharge *but at the same time was not* an employee?

THE CARRIER PAID LITTLE ATTENTION TO AGE LIMITS.

Danforth, the yardmaster, who first talked to Borum regarding employing him, said he never gave the matter of his age a thought (315).

Danforth knew Borum back in 1911 when he formerly worked for the Soo Line (325). He must have had some idea of his age.

The witness Pagel, the chief clerk, said it was his duty "to supervise the employment of all classes of help" (437).

He said he did not believe he told Borum to fill out his second application like he did the first one (444). He made no investigation as to Borum's age (503-505).

Pagel testified that he was not sure but thought he had sent Borum to the Superintendent, as Borum had testified (494-495).

He did not have any recollection of telling Borum he looked too old but stated that he could not remember the conversation he had as to Borum's age (496, 498-499).

Ordinarily, he would take the application as to age to be correct (501-502).

In spite of the fact he knew the practice as to giving the so-called railroad age, he made no investigation as to the same (504-505).

He did not make a practice of ascertaining ages (506). He made no inquiry at all about Borum's age (507).

KNOWLEDGE OF COMPANY AS TO MISSTATEMENT OF AGE—THE PRACTICE.

The finding of the Arbitrators that the Company knew of the practice of men to misstate their age is borne out by this testimony brought out by questions of M. M. Joyce, one of the Arbitrators.

"Mr. Joyce:

Q. In the light of your experience in the employment bureau, do you know of, or is it a general practice of the men, giving an age other than their actual age, for the purpose of employment on the Soo Line?

A. On the Soo Line?

Q. Yes.

A. I believe I will have to have that again.

(Previous question read.)

A. That is a general question, is it?

Q. Yes. Are you familiar, or is there such a practice, to your knowledge, of the men, in an effort to escape the rigor, possibly, of the limitation of forty-five years?

A. I believe there is; I think it is quite general" (489-490).

On cross examination of this witness by counsel for plaintiff, the following appears:

"Q. This practice which Mr. Joyce asked you about, of men giving younger ages when they were old, and older ages when they were young, you knew it existed practically all the time that you have worked for the Soo Line?

A. *I know it is a general practice, yes*" (493).

This Employing Clerk further said:

"Q. (Continuing.) You know that that is the gen-

eral practice in this northwest territory, and that is where you have been working for the last seventeen years?

A. Yes, sir.

Q. (Continuing.) —for men to give ages younger than they are, when seeking employment on the railroad?

A. I would not say that I know it is the practice; I believe it is an understanding.

Q. Didn't you state to Mr. Joyce that that is a practice that you knew existed among the railroad men, to a large extent, and it was a practice?

A. *I think it is done every day, yes.*

Q. *You think it is done every day?*

A. *Yes.*

Q. In spite of the fact that you knew that—and you knew it, of course, in 1921, while you were in that department?

A. Sure.

Q. In spite of the fact that you knew that, as I understand you, you made no investigation with reference to his age, had you?

A. I would have no occasion to.

Q. You made no investigation as to his age?

A. I did not make any investigation" (503-505).

There is no evidence in the record nor was any claim made by counsel that the practice of misstating ages or the employees giving "railroad ages" was not general in this Northwest territory. *Neither did the Employer deny that it had knowledge of that practice.*

From 1901 up to the time of the hearing there was no change in the policy as to not investigating ages of applicants for employment (545).

The employment clerk also admitted that he might temporarily put a man to work *even if he were fifty years of age.*

"Q. Now, you say 'temporary work'; if a man puts down his true age, advising you that he is over the age, you say he might be employed for temporary work in times of stress for men, what do you mean by that, Mr. Pagel?

A. Well, if a man comes in and wanted a job, and I asked him how old he was, and he said, '*I am fifty years old*,' if he could pass the doctor's examination, *I would put him to work temporarily*, but I would put him out inside of thirty days.

Q. What do you do in a case where a man, for instance, discloses his true age, and he is over age, and you employ him for thirty days, how do you handle his application in that case?

A. *I put it to one side, and within thirty days—I take probably the twenty-ninth day—I would take him out of the service*" (550-551).

Mr. Curtis, who was assistant superintendent (552-553), stated that Danforth, the yardmaster, may have talked to him about Borum's re-employment and he, Curtis, may have forgotten it (561). He had no recollection of Borum coming to see him (562).

THE THIRTY DAY RULE.

One of the Arbitrators, Mr. Joyce, asked certain questions of the superintendent of employment regarding the status of the employee after the thirty day period:

"Mr. Joyce: Mr. Schutt, this record shows that

Mr. Borum went back to work in 1921, the second time, and that he was hurt in December, 1928; *he was there approximately some seven years.* Assuming that a few days before this accident you had discovered that he was eleven years older than he had told you, and, assuming, also, that his work was satisfactory throughout that period, as indicated by the testimony of Mr. Danforth, what would you have done on the obtaining of that information?

A. *I don't think that anything could have been done at that time.* We have got to get at that *in accordance with our agreement with the organizations*—why, you have got to discover anything of that kind within a certain limit, and that does not cover years; it covers months.

Mr. Davis: Thirty days, Mr. Schutt?

(No answer.)

Mr. Joyce: Assuming that you had employed a man outside of the organization who was not bound by the contract with the organization, and that same information would come to you, what would you have done under those circumstances?

A. Oh, I don't know; that is a question.

By Mr. Davis:

Q. If he did his work all right, you would let him stay, wouldn't you?

A. *If he was desirable*—it just depends upon *whether he is desirable or undesirable.* If he lied about his application, that would be enough; we would try to get rid of him; we would get rid of him if we could.

By Mr. Palmer:

Q. *Well, as I understand it, if he was to be rejected,*

he would have to be rejected within thirty days from the time of his application, Mr. Schutt?

A. *Yes, sir*" (410-414).

The witness Schutt, on cross examination, testified that after the end of the thirty day period of employment, he "*would retain his status as an employee*" (427).

The chief clerk of the defendant, who was, in effect, the employing officer, testified relative to the thirty-day rule:

"Q. At the end of the thirty days, under article 22, he would then be immune from discharge, except for a violation of the rules and a hearing, would he not?

A. *He would be immune from discharge on anything in connection with the application.*

Q. On anything in connection with his application?

A. Yes, sir.

Q. As I understand it, *at the end of thirty days, his status as an employee of the railroad company would become fixed*, and he could not lose that employment because of anything that occurred in the application; that is correct, isn't it?

A. *Yes, sir*" (510).

"Q. At the end of the thirty days, he could not lose his status as an employee of the Soo Line Railroad Company, except for a violation of the rules, or failure to perform his work, and on charges preferred and a hearing had, that is correct, isn't it?

A. *Yes, that is right.*

Q. If he had made any misstatements otherwise than as to his age and his place of birth, for instance, if you had made an investigation, you could have readily found that out in less than thirty days, couldn't you?

A. I presume so.

Q. And you made no effort to do that?
A. No, sir" (511-512).

THE FINDINGS OF THE ARBITRATORS.

These findings are set forth in the brief in opposition to the granting of the writ of certiorari. Suffice it here to say that the arbitrators found:

A mere misstatement of age by plaintiff but the evidence "unsatisfactory" as to whether defendant knew plaintiff's real age (597, 602-3-4).

No damage flowing as a result of the misstatement of age in the application.

A general practice of men to misstate their age, which defendant knew (597).

That under the thirty day rule plaintiff was immune from discharge and his status "became fixed as an employee," upon the expiration of that period (578).

That plaintiff *was* an *employee* of defendant under the Federal Employers' Liability Act (573-574).

The Arbitrators also found that defendant had in effect the so-called 45 year age limit rule (573) of which plaintiff was aware (596) and that he misstated his age for the purpose of securing employment in disregard of the rule (598).

That plaintiff did not know he was ineligible as an applicant for employment (Supplemental Finding No. 2) (597).

SUPPLEMENTAL FINDING NO. 2.

In explanation of Supplemental Finding No. 2, the Arbitrators filed the following memorandum:

"With reference to finding No. 2 herein it is the opinion of the arbitrators that in view of the fact that

the record shows that the following testimony was given by the plaintiff: 'THEY WERE LIABLE TO HIRE ME OVER THE AGE LIMIT, WHICH THEY HAVE DONE,' and that the record further showed the defendant's witness Pagel had testified that THE PRACTICE of men giving erroneous ages in order to obtain employment was one which was being 'DONE EVERY DAY' and was A GENERAL PRACTICE 'in this northwest territory' with reference not only to the defendant but to other railroads as well—WE COULD NOT FIND THAT THE PLAINTIFF KNEW HE WAS 'INELIGIBLE AS AN APPLICANT FOR EMPLOYMENT.' We assume anybody could apply for employment and would be ELIGIBLE TO SEEK the same. This ELIGIBILITY of the applicant COULD MATURE INTO A REGULAR EMPLOYMENT even though he were over forty-five years old IF THE DEFENDANT ELECTED TO WAIVE OR MODIFY ITS RULE. Having made the rule, THE DEFENDANT COULD, OF COURSE, WAIVE, CHANGE OR ABROGATE IT."

NO FRAUD.

Inasmuch as the Arbitrators had the case of *Mpls. St. P. & S. St. M. Ry. vs. Rock*, 279 U. S. 410, in mind and still found that Borum *was* an employee they must have concluded there was no actionable fraud. Otherwise their decision would have been consistent with the Rock case.

FINDINGS FINAL.

Under the Minnesota practice a judgment based on such findings can not be disturbed if there is any credible evidence to sustain it.

The findings, as affirmed, are final in this court. (*M. St. P. & S. St. M. Ry. vs. Moquin*, 283 U. S. 52, 51 Sup. Ct. 501.)

DECISION OF LOWER COURTS UNANIMOUS IN APPELLEE'S FAVOR.

The District Court affirmed the award and the Supreme Court of the State affirmed the action of the District Court.

It might be noted that one of the Arbitrators, Mr. M. M. Joyce, has recently become one of the Judges of the United States District Court for the State of Minnesota.

The award was confirmed in the State Court by Judge Gunnar H. Nordbye who, since that time, has also become a Judge of the United States District Court for the State of Minnesota.

The law questions in the case were passed on, therefore, not only by the Supreme Court of the State, but by other lawyers and judges of the highest standing.

ARGUMENT.

THE QUESTIONS FOR DETERMINATION BY THIS COURT.

1. IS A MERE MISSTATEMENT OR MISREPRESENTATION OF AGE MADE BY AN EMPLOYEE, TO SECURE EMPLOYMENT, SUCH A FRAUD ON THE EMPLOYING CARRIER THAT IN THE EVENT OF INJURY TO WHICH THE MISSTATEMENT OR THE EM-

PLOYEE'S CONDITION DID NOT CONTRIBUTE, THE EMPLOYEE CANNOT BE DEEMED AN EMPLOYEE, WITHIN THE MEANING OF THE EMPLOYERS' LIABILITY ACT, OR ENTITLED TO THE BENEFITS THEREOF?

2. IF THERE WAS, IN FACT, NO MISREPRESENTATION OF AGE BUT A MERE MISSTATEMENT THEREOF IN THE APPLICATION FOR EMPLOYMENT, AND THE CARRIER WAS NOT DECEIVED THEREBY, CAN PLAINTIFF BE DEPRIVED OF THE STATUS OF AN EMPLOYEE AND OF THE BENEFITS OF THE FEDERAL ACT?

3. IF THE EVIDENCE OF FRAUD ON WHICH THE EMPLOYER DEPENDS AS A DEFENSE IS "UNSATISFACTORY," DOES SUCH EVIDENCE FURNISH SUFFICIENT GROUNDS TO REQUIRE THE REVERSAL OF THE UNANIMOUS ACTION OF THE LOWER TRIBUNALS?

4. WAS THE PLAINTIFF'S STATUS AS AN EMPLOYEE, UNDER THE AGREEMENT BETWEEN THE UNION AND THE CARRIER, FIXED SO THAT HE WAS IMMUNE FROM DISCHARGE AFTER THE EXPIRATION OF THIRTY DAYS FOLLOWING THE DATE OF HIS APPLICATION?

5. CAN THE DEFENSE OF VIOLATION OF RULE 16 BE SET UP IN VIEW OF THE PROHIBITIONS AND PROVISIONS OF THE EMPLOYERS' LIABILITY ACT?

Questions 1, 2 and 3 are so closely related that they will be argued together.

The contention of the appellee is that a misrepresentation

of age, even if made with intent to deceive, could not prevent a recovery.

It is further contended that there was not even a misrepresentation of age, but that the misstatement appearing in the application *did not mislead the carrier,* because its officers and agents really knew, or under the circumstances should have known, that Borum was more than thirty-eight years of age.

It will be recalled that he had been previously employed in 1911. This was ten years before his second employment in 1921. The fact of having been employed so long ago as 1911, together with Borum's testimony that he told the employing clerk and superintendent his "railroad age"; that he told Danforth he was eleven years older than his railroad age, plus the admission by the employing clerk of defendant that the men generally misstated their age—these facts negative deception.

The arbitrators found the evidence as to whether defendant knew of plaintiff's age "unsatisfactory." If defendant knew Borum's age there was no fraud and no deceit. The finding is that the *only defense* of the carrier is "unsatisfactory." Evidence to sustain a claim or a defense must be more than "unsatisfactory."

Under the Minnesota rule, if there is any evidence to sustain the judgment it must be upheld. But to go further, defendant relies on fraud for its defense. The *facts* do not show fraud. The finding of the Arbitrators as to the fraud, the basis of the defense, is "unsatisfactory." The defense therefore fails.

DECISIONS UPHOLDING MINNESOTA SUPREME COURT PRACTICALLY UNANIMOUS.

The courts, with practical unanimity, have held that a mere misrepresentation of age, or some similar misrepresentation, could not deprive an employee of his right of recovery. This has been the holding in New York, Missouri, Kansas, Kentucky, the Circuit Court of Appeals of the Eighth Circuit, and many other jurisdictions.

We call attention to a few of the cases:

Hart vs. New York Central, etc., 205 N. Y. 317, 98 N. E. 493;

Matlock vs. Railroad, 198 Mo. 495, 95 S. W. 849, 115 Am. St. Rep. 481;

Lupher vs. Atchison, etc., R. Co., 81 Kan. 585, 106 P. 284, 25 L. R. A. (N. S.) 707;

Louisville, etc., vs. Lewis, 218 Ky. 197, 291 S. W. 401;

Payne vs. Daugherty (C. C. A.), 283 Fed. 353;

St. Louis, etc., vs. Brantley, 168 Ala. 579, 53 So. 305;

Ward vs. Elgin, etc., R. Co., 259 Ill. App. 672;

Qualls vs. Atchison, etc. (Cal. App.), 296 P. 645;

Lake Shore & M. S. R. Co. vs. Baldwin (Ohio Circuit Decisions, Vol. 10,333);

Kansas City M. & O. R. Co. of Texas vs. Estes, 203 S. W. 1155 (Tex.);

Galveston R. Co. vs. Harris (Tex.), 107 S. W. 108;

Baker vs. Beattie, 222 S. W. 658 (Tex.);

Hazoo & M. V. R. Co. vs. Cobb, 48 So. 522 (Miss.);

Denver & R. G. R. Co. vs. Reiter, 47 Colo. 417, 107 Pac. 1100.

Other cases are referred to in an excellent article on this subject, entitled, "Misrepresentation to Secure Employ-

ment," by Professor Maurice H. Merrill, and which appears in 43 Harvard Law Review 141, 28 Michigan Law Review 357, and 14 Minnesota Law Review 646.

A discordant note appears here and there in such cases as *Stafford vs. B. & O. R. Co.*, a decision of a lower Federal District Court, 262 Fed. 807, and *Norfolk, etc., vs. Bondurant, Adm'r*, 107 Va. 515, 59 S. E. 1091. The Illinois Appellate Court, not the highest court of that state, was of the opinion that the Rock case prevented a recovery because of a mere misstatement. (See *Ward vs. E. J. & E. Ry. Co*, 259 Ill. App. 672.) A Texas decision holds likewise, *Fort Worth & D. C. Ry. Co. vs. Griffith*, 275 W. (2d) 351.

In *Blick vs. Toye Bros., etc.*, 13 La. App. 525, 127 So. 59, the court held that a mere misrepresentation did not render the contract of employment void but only voidable.

The Rock case, upon which defendant relies, was held inapplicable in *Gango vs. Ford Motor Co.*, 250 Mich. 247, 230 N. W. 159.

A discussion of all the cases can serve little purpose. There is no question but that the general holding and the well reasoned decisions are to the effect that a mere misrepresentation, such as charged to Borum, cannot defeat a recovery. Of course, in the case at bar, there is no satisfactory evidence that there was any misrepresentation.

QUESTION 5.

WOULD THE ENFORCEMENT OF THE RULE OF THE DEFENDANT VIOLATE SECTIONS 1 AND 5 OF THE EMPLOYERS' LIABILITY ACT?

Section 1 of the Employers' Liability Act provides that "EVERY COMMON CARRIER BY RAILROAD * * *

SHALL BE LIABLE IN DAMAGES TO ANY PERSON SUFFERING INJURY WHILE HE IS EMPLOYED BY SUCH CARRIER IN SUCH COMMERCE * * * FOR SUCH INJURY * * * RESULTING IN WHOLE OR IN PART FROM THE NEGLIGENCE OF ANY OF THE OFFICERS, AGENTS OR EMPLOYEES OF SUCH CARRIER."

Section 5 of the Act provides as follows: "ANY CONTRACT, RULE, REGULATION OR DEVICE WHATSOEVER, THE PURPOSE OR INTENT OF WHICH SHALL BE TO ENABLE ANY COMMON CARRIER TO EXEMPT ITSELF FROM ANY LIABILITY CREATED BY THIS ACT, SHALL, TO THAT EXTENT, BE VOID."

Does the urging, as a shield in a lawsuit, of the carrier's rule that it will not employ men over 45 years of age offend against these two sections of the Federal Act?

Section 1 does provide that the employee can recover if he is injured while engaged in interstate commerce by the negligence of the carrier or its employees.

Borum was concededly engaged in interstate commerce. There is no question in the case but that the carrier was negligent, such negligence proximately causing Borum's injury.

There is nothing in Section 1 *in any way having to do with preliminary matters leading up to the employment* in interstate commerce. The statute says that if there is employment in such commerce and resulting injury due to negligence, the employee can recover.

Section 5 provides that any rule, which has for its purpose or intent an avoidance of liability, shall to that extent, be void.

"EMPLOYED" AND "EMPLOYEE" USED IN NATURAL SENSE.

We quote the language of Mr. Justice Pitney in *Hull vs. Philadelphia & Reading Ry. Co.*, 252 U. S. 475, 64 L. Ed. 670, as to the meaning of the words "employee" and "employed."

> "We hardly need repeat the statement made in *Robinson vs. Baltimore & O. R. Co.*, 237 U. S. 84, 94, 59 L. Ed. 849, 853, 35 Sup. Ct. Rep. 491, 8 N. C. C. A. 1, that in the Employers' Liability Act Congress used the words 'employee' and 'employed' *in their natural sense* and intended to describe the conventional relation of employer and employee. The simple question is whether, under the facts as recorded, and according to the general principles applicable to the relation, Hull had been transferred from the employ of the Western Maryland Railway Company to that of defendant for the purposes of the train movement in which he was engaged when killed. He was not a party to the agreement between the railway companies, and is not shown to have had knowledge of it; but, passing this, and assuming the provisions of the agreement can be availed of by petitioner, it still is plain, we think, from the whole case, that deceased remained for all purposes—*certainly for the purposes of the act*—an employee of the Western Maryland Railway Company only."

RULE 16 CANNOT DEFEAT LIABILITY.

The Circuit Court of Appeals of the Eighth Circuit in *Payne vs. Daugherty*, 283 Fed. 353, a case where the defense of misrepresentation was asserted, said:

> "Furthermore, this action was brought under the Fed-

eral Employers' Liability Law (35 Stat. 65 (Comp. St., ##8657-8665)), and the fault of the defendant was alleged under the Safety Appliance Acts (27 Stat. 531; 32 Stat. 943 (Comp. St. ##8605-8615)). *And in our opinion we should hold that the defense urged was not available, in view of the positive terms of sections 1 and 5 of the former act.* See *Phila., Balt. & Wash. R. R. vs. Schubert*, 224 U. S. 603, 32 Sup. Ct. 589, 56 L. Ed. 911; *Chicago & Alton R. Co. vs. Wagner*, 239 U. S. 452, 36 Sup. Ct. 135, 60 L. Ed. 379; *Spokane & Inland R. R. vs. Campbell*, 241 U. S. 497, 36 Sup. Ct. 683, 60 L. Ed. 1125."

Payne vs. Daugherty, cited above, follows *Phila. B. & W. R. Co. vs. Schubert*, 224 U. S. 602, 56 L. Ed. 911. In the Schubert Case, Mr. Justice Hughes, speaking for the Court relative to the rule in question, used this language:

"The words, 'the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this act,' do not refer simply to an actual intent of the parties to circumvent the statute. The 'purpose or intent' of the contracts and regulations, within the meaning of the section, is to be found *in their necessary operation and effect in defeating the liability* which the statute was designed to enforce. Only by such general application could the statute accomplish the object which it is plain that Congress had in view."

RULE COULD NOT PREVENT RECOVERY—RULE WAS WAIVED, EVEN IF DEFENSE NOT BARRED BY STATUTE.

In *Burho vs. Minneapolis & St. L. R. Co.*, 121 Minn. 326, 141 N. W. 300, the same doctrine being re-affirmed in *Otos vs. Great Northern R. Co.*, 128 Minn. 283, 150 N. W. 1022

(affirmed 239 U. S. 349), it was said that the carrier could not adopt rules and allow them to remain dormant and only bring them out for enforcement as a shield in a lawsuit. We quote the following from the Burho case:

> "It is plain that the promulgation of rules, which are *allowed to remain unenforced and dormant* until invoked *as a shield in a lawsuit*, is then to be given *scant consideration*, and will not serve to protect from liability for failure to comply with a mandatory statute. By this observation, based on the facts of this case, we do not intend to *intimate an opinion that a railway company may so frame and enforce rules that the protection intended to be given by the Federal Employers' Liability Act is taken away, especially in view of section 5 thereof.*"

In the cases mentioned, there was a rule that employees should not go between the ends of moving cars. The Court in each instance held that such rule could not be asserted as a defense because it was in violation of Section 5 of the Federal Act.

If it be said that the rule as to employing men over forty-five years of age did not have the purpose or intent of defeating recovery, the answer is the statement of this Court in the Schubert case, 224 U. S. 602, that *if the natural effect* of the enforcement of the rule *is to defeat liability*, the rule does contravene the statute.

In the Otos and Burho cases, the rule did not, in and of itself, say that violation thereof would prevent recovery in case of accident but the rule was general to the effect that employees should not go between the ends of moving cars. It was asserted as a defense in these cases and held unavailing to the carrier.

Payne vs. Daugherty (C. C. A., 8th Cir.), 283 Fed. 353, *supra*, lays down the same proposition with reference to a rule as to misrepresentation of age, physical condition, etc.

QUESTION 4.

The Thirty Day Rule.

Was the plaintiff's status as an employee, under the agreement between the Union and the carrier fixed so that he was immune from discharge after the expiration of thirty days following the date of his application?

It will be recalled that defendant's witnesses admitted that under the thirty day rule plaintiff would be immune from discharge after the thirty days because of anything which appeared in his application for employment.

Under the thirty day rule according to the admission of defendant's Chief Clerk, the Employing Officer, and the Superintendent, Schutt, after the expiration of thirty days, the employee would be immune from discharge on account of anything stated in the application (510-512) (410-414). The Arbitrators found that plaintiff's status became fixed after thirty days and that he was immune from discharge (see Finding quoted in opinion of Minnesota Supreme Court Record, page 256). The Minnesota Supreme Court said:

> "We accept the finding of the arbitrators based upon the testimony of defendant's witnesses that the employee became an accredited employee at the end of thirty days" (page 264).

There is fully as much reason for Rule 22, the thirty day rule, as there is for Rule 16, regarding employing persons over forty-five years of age.

Employees make application for work and if they are not

rejected after the thirty days, often change their place of residence, have their families moved and otherwise rearrange their affairs. They are safe in doing this because of the agreement of the Union with the employer that after the thirty day period the employee could not be discharged because of anything appearing in the application.

THE THIRTY DAY RULE A LIMITATION.

The thirty day clause is in effect a limitation which the parties have placed upon themselves.

They agree that after the lapse of that time no action can be taken. This is analogous to shipping contracts or drovers contracts. Such contracts have been upheld by the Courts when containing agreements between the parties that an action could not be maintained unless notice were given within thirty days. This was a limitation agreed upon by the parties. It was in effect a Statute of Limitations. This Court held such limitation valid. *Gooch vs. Oregon Short Line Co.*, 258 U. S. 20, 66 L. Ed. 443. The Thirty Day Rule of the Union and the carrier is in effect the same sort of limitation agreed upon by the parties in the Gooch case.

There is also an analogy between the thirty day rule and the incontestability clause found in insurance policies. These clauses have been generally upheld. See *Reegan vs. Union Mutual Life Ins.*, 189 Mass. 555.

PHYSICAL CONDITION IMPORTANT—AGE UNIMPORTANT.

As is true in life generally, the matter of age is not so important as physical condition. Borum was physically fit. The carrier was not particularly interested in enforcing its

rule as to age limits if the men had physical fitness. The employing clerk, Pagel, testified that they paid little attention to age, but did insist upon a physical examination.

If a misrepresentation of age bars recovery where is the line of demarcation? Would a misrepresentation of one day be sufficient? One month? One year? Two years? Five years? Fifteen years?

Would a misstatement in the application as to whether or not the applicant was married defeat a recovery?

Would a misstatement as to whether the applicant had ever had a claim against another company defeat recovery? A misstatement as to his religious affiliation? As to his political affiliations? As to his nationality?

A line has to be drawn somewhere if the Court should go to the harsh extreme of holding that a misrepresentation would bar a recovery.

CONSIDERATION OF THE ROCK CASE.

The Rock case has been so often referred to and has been distinguished in the Respondent's brief in opposition to the Granting of the Writ so that a lengthy discussion of the same is not necessary. We do not think the case in point. For Respondent to prevail it is not necessary that it be overruled. Some further discussion may, however, be helpful. Joe Rock, the plaintiff in that case, being physically unfit and having been rejected for employment, gave his name as John Rock, in a second application. He then had one Lenhart take the physical examination for him. Lenhart, claiming he was John Rock, took and passed the examination and Joe Rock, under the name of John Rock, and without having passed the physical examination, was employed. He was injured and recovery was denied because of the

gross fraud in securing employment.

The basis of the Rock decision was deception and fraud. The Railway Company was deceived:

1. As to Rock's identity.
2. As to his physical condition.

Even under these extreme circumstances—with this abhorrent fraud, still many lawyers feel that the decision of this Court in the Rock case is incorrect and departure from settled rules of law.

Of the decision in the Rock case, Professor Merrill in an article appearing in 43 *Harvard Law Review* 141, 28 *Michigan Law Review* 357, and 14 *Minnesota Law Review* 646, says,

> "The result reached, relieving the railway of the liability under which it would otherwise rest, solely because of the deception by which employment was secured, is in direct conflict with the vast majority of state decisions involving employer's liability at common law. Likewise it conflicts with the state decisions under the federal act and overrules at least one decision of a federal appellate court. That a decision is opposed to the numerical weight of authority or that it mars the symmetry of the logical structure of the law as developed from the analysis of decided cases is not, of course, an insuperable objection to it, but at least it casts a doubt upon its proper place in the fabric of the law. In this state of the authorities, therefore, it seems proper to examine the problem raised by the Rock Case from the standpoint of general contract principles, from the language of the Employers' Liability Act and from the standpoint of policy, in order to determine its correctness."

The learned Professor further says,

> "It seems unquestionable therefore that as a matter of common law principles relating to the status of master and servant Mr. Justice Butler's conclusion that Joe Rock never became the railway's employee cannot be sustained. Does the Employers' Liability Act use the term in any such specialized or restricted sense as would make attainment of the employee status conditional upon exercise of the utmost good faith in applying for a job? Nothing in the terminology of the act suggests such a restriction. It speaks solely of injury to persons 'employed by such carrier' and of 'employees' without qualification as to the manner in which they secured employment."

Again Professor Merrill uses this language quoted in part from *Robinson vs. B. & O. Ry. Co.*, 237 U. S. 84; 59 L. Ed. 849:

> "We are of the opinion that Congress used the words 'Employee' and 'Employed' in the statute in their natural sense, and intended to describe the conventional relation of employer and employee."

The statement was reiterated, accompanied by the remark that it hardly needed repetition, in *Hull vs. Philadelphia & Reading Railway*, 252 U. S. 475, *supra*. The Act itself furnishes no justification for a new definition of the words "employer" and "employee."

Professor Merrill also takes the position that the Rock case gives to the employing carrier rights which Congress never intended the carrier to have. Again we quote from his article:

> "To deny recovery in the event of injury, solely be-

cause of the misrepresentation, is giving the *employer* a wholly unexpected relief *which he in no manner deserves.*"

The Professor differs with Mr. Justice Butler as to the purpose of the act, saying:

"Not only, therefore, is the rule adopted in the Rock Case out of harmony with the general principles of law governing the master-servant relationship and with the current of prior decisions in similar cases; it is also out of harmony with the accepted judical rationale of the employer-employee relationship under the Employers' Liability Act and it fails to promote any purposes of expediency which might justify the departure from iogical harmony with the course of decision elsewhere. In spite of Mr. Justice Butler's declaration to that effect, the purpose of the Employers' Liability Act was not to dragoon the railroads into selecting operatives who are physically and mentally fit. There are other considerations of self interest which may be relied upon to secure that. The end in view was rather to place upon the industry the duty of caring for the human sacrifices to the demands of the machine age in a manner more satisfactory to modern thought than that provided by the rules of the common law. * * * It seems clear that the doctrine should not be extended beyond cases arising under the Employers' Liability Act. Is it too much to hope that the Court may yet overrule the decision in cases arising under that statute? If it is, then Congress should overturn it by express and unmistakable provision."

Professor Merrill, it will be noted, states that the situation is so serious that if the Rock case be not overruled

Congress should legislate in order to overcome the effect of this decision.

It is a matter of common knowledge that a very substantial percentage of men employed in railroad industry lie in order to get jobs.

Every person on the street knows this and the Courts take judicial knowledge of what is so commonly known. Appellee is not now contending that the Rock case should be overruled. But the doctrine has no application to a case of mere misstatement of age.

WHAT REMEDY FOR EMPLOYEES?

Suppose John Jones has worked for the Soo Line for twenty-five years. He is still employed by them. When he secured employment he misstated his age ten years. He is now past the age where he would be accepted as a new employee. If the Rock case is to be applied, what is Jones' position? Should he go to his master and say he lied to get a job? If this resulted in his discharge he could not secure new employment. He is too old to be reemployed. If he made out a new application for employment would he lose his seniority rights? Should he advise his employer of this misstatement? He is past middle age. He has a wife and children dependent upon him. He is in a hazardous occupation. If he is killed through his employer's negligence, can his dependents recover damages? The rule of the Rock case should not be extended to bar his recovery.

MEN OVER FIFTY MIGHT BE EMPLOYED.

Not only does the record show that men can work as switchmen for the Soo Line until they are sixty-five or even seventy years of age, but the Chief Employing Clerk admits (552) that he might employ a new man, even though he were fifty years of age. He said he would keep him for twenty-nine days, if he were needed, and then fire him before the expiration of the thirty day period.

IF ONE RULE ENFORCED, WHY NOT ANOTHER?

If the forty-five year limit rule is to be enforced, why not the thirty day rule? The rule which benefits the carrier, which is contrary to the spirit, if not the letter of the Employers' Liability Law, is sought to be enforced to prevent a recovery. But in the same breath the carrier asks that the thirty day rule be not enforced!

Without the rule the carrier does not even have the semblance of a standing in Court. It is only because of Borum's violation of the age rule that the carrier tries to avoid liability. In the Rock case there was a fraud which would have been present, *rule or no rule.* In the present case the defense is based solely on the violation of a rule.

Had Borum made his true age known to the Company before the accident, assuming that they did not know it, he could not be discharged for the misstatement of age because of the thirty day rule. A different situation would apply in the Rock case. There was actual deceit and mistake in identity in that case and upon a hearing there is no doubt but that Rock could have been discharged.

BORUM WAS AN EMPLOYEE.

Under the facts, Borum having worked seven years for the Soo Line immediately preceding his injury, he was an employee within the meaning of the Act.

Many a man lied to get into the Army at the commencement of the Civil War. Many a man gave his age as eighteen or nineteen when he was, in fact, fifteen or sixteen. If such a person had served four years during the Civil War, could he be considered during that time as a soldier—that is an employee of Uncle Sam? Would his Government try to deprive him of his pension because he was not a soldier, because he lied to get a job? The answer is obvious.

BORUM WOULD BE ENTITLED TO WAGES.

Let us suppose after Borum had worked seven years for the Soo Line they refused to pay him a month's wages because he misstated his age in the application for employment.

Before no Court in the world could the employer avoid payment of the wages because Borum had misstated his age, on the ground that this deprived him of the status of an employee. He worked for his master, he did his work properly and well. The master got the benefit of his work and certainly no Court could say that Borum should not have his wages because of a mere misstatement of age.

From what has been said the conclusion must follow that even if the Rock case is to be followed, the doctrine should not be applied to a case of mere misrepresentation of age.

Mr. Justice Butler in the very recent case of *Baltimore & Philadelphia Steam Boat Co. vs. Norton*, 52 Sup. Ct. 187, decided January 11th, 1932, said that *laws providing for the relief of injured employees should be construed liberally.*

There would be little liberality in depriving a man who had lost both legs of his full compensation merely because he misstated his age in order to get a job.

CONCLUSION.

A verdict for a plaintiff must rest on substantial evidence and not on speculation and conjecture. See *C. M. & St. P. Ry. Co. vs. Coogan*, 271 U. S. 472.

By the same token the defense of the carrier, based on fraud, must be tested by the rules generally governing fraud actions. The best that can be said for the carrier in this case is that there was a misrepresentation as to age.

No clear defense of fraud was made out, nor was there satisfactory evidence of reliance on the claimed fraud nor satisfactory evidence of damage as a result of the fraud. Taking the most favorable view of the evidence for Borum, it appears that the carrier actually knew his age. In view of the fact that the lower tribunals were unanimous in his favor, the evidence should be so considered. No tribunal found any fraud in this case.

The findings of the Arbitrators upon the question as to whether the carrier knew Borum's age was that the evidence was "unsatisfactory."

If the evidence relied upon by a plaintiff were unsatisfactory, recovery would be denied him. The finding of the Arbitrators, unanimously sustained by the Minnesota Courts, is that Borum *was* an employee; that the evidence as to whether *the* employer knew his real age was "unsatisfactory." Consequently there is no such fraud as found in the Rock case. "The finding is," as above stated, "and our sole concern is as to the action it requires." The language just quoted is taken from the opinion of this Court in *Minne-*

apolis, St. Paul & Sault Ste. Marie Ry. Co. vs. Moquin, 283 U. S. 52, 51 Sup. Ct. 501; 75 L. Ed. 1243.

If the Court does not give conclusive effect to the findings of the Arbitrators and the lower Courts, that the defense as to fraud is "unsatisfactory," then, and if the Court should decide the matter *de novo*, certainly, in the state of the evidence, the Court cannot say that the defense of fraud has been made out.

It is a cardinal rule that fraud without damage gives no right of action. Fraud without damage should be no defense.

The Employers' Liability Law should be liberally construed to effectuate its humane purposes, as the Courts have so frequently said. The construction contended for by Appellant is not humane or liberal, but harsh.

In conclusion, let us again refer to the appropriate statement appearing in the notes to the *Minnesota Law Review*, Volume 16, No. 2, pages 216-217, wherein it is stated that to make the doctrine of the Rock case applicable to the present case "*would extend the doctrine of the Rock Case to a harshness beyond reason.*"

Respectfully submitted,

TOM DAVIS,

ERNEST A. MICHEL.